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Panel Discussion I

PANEL DISCUSSION I

PROFESSOR WRIGHT: I will exercise the moderator's prerogative to put the first question to Dean Griswold and ask if it is true that in his distinguished old age he has become the modern-day Baron Parke and wants a rigid formalistic approach to the law.

DEAN GRISWOLD: Thank you for giving me the opportunity to respond. I think I will open with a story about another English judge who was a Lord Chancellor, but not regarded as very distinguished. Unfortunately, I do not remember his name, but we will call him Lord Smith. In one of the early editions of Campbell's *Lives of the Lord Chancellors*,[1] one can turn to the index and find "Lord Smith [subheading] 'His Great Mind' . . . 39." On page thirty-nine it says, "I have a great mind to commit you for contempt." Insofar as my intention was concerned, maybe not what I wrote, I think that the suggestion that I am a Baron Parke is as misleading as is that passage in the index to the *Lives of the Lord Chancellors.* Professor Wechsler points out that there are some things that could be used to support this suggestion when I object to discretionary justice. But I try hard, at least in one passage, to say that the law was not and could not be rigid and mechanical and that it is true, of course, that the way it properly develops is by taking into account new developments, new circumstances, and new ideas, and using them to modify and develop the law. I would be as far removed from wanting to prevent that as were those eminent academics at Columbia University in Professor Wechsler's student days.

I think while I have the podium, I would like to take the opportunity to pay a tribute. I suppose the reason I am here today is Felix Frankfurter. He was my professor of federal jurisdiction and out of his teaching I developed a great interest in not only the intellectual, "chess-playing" complexities of federal jurisdiction, but also in the tremendous importance of the allocation and division of functions between the state courts and the

1. J. CAMPBELL, THE LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND (London 1848).

federal courts. He was really a remarkable teacher. He came to class quite unprepared, but he bubbled. He threw out ideas like this and had the class actively stimulated from beginning to end. It could be a seminar that lasted two hours on one aspect of *Ex parte Young*,[2] for example, and would show more things arising out of it than any of the students coming to the class could have imagined. I think he has been somewhat misunderstood in recent times by people who did not know him. I have seen him treated as an archconservative who held the country back in various and sundry ways. I do not think that is accurate. He really remained very consistent to his ideals from beginning to end. He had his failings: he could be irascible and he was as inconsiderate in many ways as anybody I have ever known. If we had a function at the Harvard Law School at which he was the honored guest, and it was set for 7:00 p.m., he would show up at 7:45 p.m. Although he was sometimes a little difficult, I would say that, as far as I am concerned, he is the great man of federal jurisdiction. *The Business of the Supreme Court*[3] was published in 1928. I think it is quite fair to say that modern knowledge and thinking about federal jurisdiction finds its most solid basis in this book. Some people have said that it was written by Jim Landis. I have no doubt that most of the footnotes were put together by Jim Landis, but the basic idea and much of the writing undoubtedly came from Felix Frankfurter. That is an irrelevant commentary, but I thought I would like to make it.

PROFESSOR WRIGHT: Dean Carrington, do you want to correct any misimpressions we may have had of your paper?

DEAN CARRINGTON: I guess I might begin by trying to rehabilitate it. It was really Shirley Hufstedler's proposal, and I think Professor Bator rightly corrected a little bit of puckishness in my advocacy of it. I have advocated other kinds of approaches and solutions to this sort of problem in the past and have gotten tired of the indifference with which they have been met. So, I thought I would try something different.

The virtue of the idea, it seems to me, is that it does rehabilitate the appellate process. If you are concerned about the amenities of appellate procedure, of finding judges who are willing to listen to argument, who are willing to confer, discuss and

2. 209 U.S. 123 (1908).

3. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT (1928).

read the cases on their own, and then write an opinion explaining the result in every case, then you are going to have to adopt some kind of variation on the Hufstedler plan to accomplish that. I see no realistic hope that that procedure could be rehabilitated within the existing framework of the United States Courts of Appeals. Somebody else is going to have to do that. Indeed, even if you could somehow or other take a great deal of the workload off the present courts of appeals, I think it would be difficult to persuade the circuit judges that that was primarily their task. There is an old saying that once the kids have seen the city, it is hard to get them back on the farm. I think once you have got an institution that is accustomed to the kind of role to which the circuit judges are accustomed, it would not be very easy to get them back into the rather prosaic work of reading transcripts and paying heed to the specific applications of the law in particular cases. That is the thrust and purpose of the proposal.

One of the things that was puckish about my suggestion of the proposal is that it does leave the existing framework of the courts of appeals out there with a big question mark around it. One of my reasons for suggesting it, however, is that it does force you to think about what is the role of the courts of appeals, why they are there, and what kind of an organization they should be. I can come up with a number of schemes that would respond more effectively. Maybe it might help to flush out my favoritism for Judge Hufstedler's suggestion by going back to an idea that I did publish in 1969.[4] I suggested that the United States Courts of Appeals should be unified into a single court with the number of judges somewhat reduced. The judges would be organized according to subject matter panels that would deal with the cases in different categories, much as the Federal Circuit does now and might include some specialized panels of the kind that Dean Griswold has advocated. I still think that is a pretty good idea. I have not heard anything that is terribly wrong with it, but it is not an idea whose time has come.

My thought was, and is, that maybe if we could rehabilitate the appeal and recognize that people have a right to have the district judge's decisions reviewed, that we might, starting with

4. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 612-16 (1969).

that as a premise, address more seriously the structural questions about who and what the present circuit courts are, how they got to be organized that way, and whether they should continue in their present form.

One other thing I would like to say about the right of appeal. I do think that it needs to be rehabilitated. I believe that Judge Don Lay is essentially correct: what we now have is only a nominal right of appeal and, while that may be better than nothing, it is, in fact, true that in many cases the process through which we go does not recognize that right of appeal and something needs to be done about it.[5]

I do not think that eliminating the right of appeal makes a whole lot of difference, as I suggested.[6] I do not think that it will save a great deal of time. If a judge has to decide whether to think about a case, in other words, whether to grant certiorari, the judge will end up thinking about the merits of the case in making that limited decision. This reminds me a little of the story I once used as a challenge, which I used to offer my children as well. It comes from an experience reported by Leo Tolstoy. His older brother used to torment him by telling him that anything he wanted would happen if he could sit for an hour in a corner of a room and not think of a white bear. Tolstoy spent a great deal of his youth sitting in the corner trying not to think of a white bear, but he always thought of it. My kids found from the same experience that they could not do it either. Judges trying to exercise discretion about whether to entertain an appeal will be a little like trying not to think of the white bear. I think it would be very difficult, impossible in fact, to consider whether an appeal ought to be heard without trying to decide whether it is a meritorious appeal. So, I do not think that ends up amounting to much.

I have one other comment, if I may, and this is really a response to Professor Wechsler.[7] I would associate myself with virtually everything Dean Griswold said. I also agree that, at least I hope, I am not advocating a return to the formalism of the 1920s. I think the difference may lie in the nature of the kinds of

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5. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 Sw. L.J. 1151, 1155 (1981).

6. *See* Carrington, *supra* p. 430.

7. *See* Wechsler, *supra* p. 444.

cases we are thinking about. I think it might be useful to offer an example. When I consider these problems, I think about quite prosaic cases involving statutory interpretation in which the need for open-ended consideration of all the social, political, and economic consequences of the decision is not very great. Some years ago, I did a little empirical work through the courtesy of the then Solicitor General Griswold. In the course of that study, I identified one issue in particular that was percolating, as they like to say. The question was whether or not you could use foodstamps at a Kentucky Fried Chicken stand. It turned out that the question was being litigated in seventeen different United States District Courts by seventeen different franchisers. It was a question that was going to be presented in every United States Court of Appeals and the Solicitor General was writing briefs and making arguments over this. It is the kind of question over which Congress has the ultimate authority, so it does not make a whole lot of difference how you answer that question. It would seem that there might be some great virtue in getting the matter resolved sooner rather than later, without having it litigated in every district in every circuit and having dozens of lawsuits over what is really a relatively trivial, prosaic question of statutory interpretation. My sense of it is that the federal system is presently surfeited with issues of that kind, that never get resolved authoritatively; or they get resolved temporarily for one part of the country only and, correspondingly, as a result of that, there is an awful lot of ferment and unnecessary uncertainty at the level of lawyers giving advice. If you advise the Kentucky Fried Chicken franchiser in your neighborhood, what do you tell him about foodstamps? There is not a great deal of virtue in a system that leaves that kind of question just permanently unsettled. But that seems to be the way our federal judicial system works at the present time.

JUDGE ROBERT E. KEETON*: I have observed that we have been bouncing back and forth between two separately identifiable problems, quite appropriately bouncing back and forth between them because they are interrelated. Nevertheless, one set of problems is concerned with the institutional structure for our appellate processes in the federal system, and the other set

* Judge, United States District Court for the District of Massachusetts. B.B.A., 1940; LL.B., 1941, University of Texas; S.J.D., 1956, Harvard University.

of problems is concerned with the nature of law and decision-making. I want to comment only on the second for a moment—on discretionary justice.

I will look at discretionary justice from perhaps a different perspective. I will identify it as a users' perspective. Lawyers and their clients and trial judges are users of this body of precedents and guidance that we are getting from the statutes and the appellate decisions. On that subject I think there was a consensus developed here today as to the nature of this problem. Now, let me describe it from the users' perspective:

> (1) Putting aside the constitutional problems, which also may be added, most federal cases involve application of one or more statutes.
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> (2) Statutes are seldom clear.
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> (3) Precedents clarifying statutory meaning are scarce.
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> (4) If the parties wish a decision, each case must be decided at least in the trial court and, in most instances, through at least one level of appeal.

Thus, the problem is how do the trial judge and appellate judge who must decide the case find authoritative guidance as to what the unclear statute means.

First, let me say that I think it makes a difference what the judge thinks about this problem. Dean Griswold has spoken of judges as having too much discretion. I think I now understand what he is saying, and I do not interpret it as a wish to return to older days. But let me make my point in another way. I would draw a sharp distinction between what a judge can get away with, which might be described as an exercise of discretion in some sense, and, on the other hand, what a judge should be trying to do. It makes a difference because the judge, whether a trial judge or an appellate judge, is making a decision that, unless overturned, will be a precedent. When the judge is addressing that kind of question, the judge should not see it as an exercise of discretion. It is an exercise in trying to find an answer as well as possibly can be found from previous authoritative guidance. If, as usual, the statute does not quite tell you and the precedents do not quite tell you, it still is not a free exercise of discretion doing what you want to do. From the trial judge's perspective, I have found that the lawyers never bring to me the cases that have a clear answer. They settle all of those. The only cases I have to worry about are the ones in which I do not have

clear authoritative guidance either in a statute or in the precedents, and I must fashion an answer that the appellate courts are not tender about reversing, rather than yielding to my exercise of discretion. They look at it de novo, as they should, because it is going to be a precedent. So all I am saying is that this problem we have been talking about with respect to exercise of discretion is one to which we should draw this sharp distinction. Not only do I think it makes a difference what I, as a judge, think about the problem, I think it makes a difference what you as lawyers think about it and say about it to the public, and what the law profession generally, including the professors, say about it to the students as well as to the public.

JUDGE CONSTANCE B. MOTLEY*: I heard some startling things today to which I think I should reply. It is probably quite ironic that Professor Bator is on my left. He really should be on my right. But, since Professor Bator has undertaken to attack the United States Supreme Court, I think the Court is entitled to its day in court, and I have elected myself as its attorney in South Carolina. I think the Supreme Court is the greatest invention since the wheel. If it were not for the Supreme Court, I would not be here. The Supreme Court of the United States, which has been attacked here today, guided this nation through the last thirty years, perhaps the most tumultuous period in this nation's history. It is fine to talk about what the role of the Supreme Court ought to be and how they ought to read the records and cite precedent and so forth, but when a nation is convulsed by a social revolution, we have an entirely different animal, and we can see now in retrospect that the Supreme Court played a role that it did not anticipate. I do not think anyone did, but the Court played that role successfully. This is a different America now after thirty or forty years. The Supreme Court brought black people into the family, so to speak, as well as women, Asians, you name it. We are in. As a result, we are looking at a country that no one could have foreseen in 1787 or 1886.

The Supreme Court, in deciding the numerous civil rights cases brought before it in the last four decades, was literally forced to decide those cases because there was no other branch

* Chief Judge, United States District Court for the Southern District of New York. A.B., 1943, New York University; LL.B., 1946, Columbia University.

of the government politically secure enough to respond to the social demands of the last thirty or forty years. It may well be that we have come to the end of the period when the Supreme Court will be the branch of government responding to social upheaval. Certainly, if there is a change in the Supreme Court beyond what we presently have, we might well see the Supreme Court revert to its prior position of a "gray eminence" somewhere in Washington from which no one ever hears. In a dynamic society such as ours, people are going to find a way to get issues resolved. If the Supreme Court is going to be unresponsive, there are going to be other forums to which the people will turn. As someone suggested earlier, I think we may be seeing that already—people have rediscovered the state court. I have been surprised myself at some of the decisions by the courts of the State of New York in recent years that go beyond anything the Supreme Court of the United States has dared to pronounce, such as a state constitutional right to shelter in a suit brought by the homeless.

When we talk about the problems of the federal courts, I think we have to bear in mind that nobody can see the future. We do not know what it is going to be. But when we have these problems presented to us, I certainly think we should be grateful that there is an established legal community that might guide us through this period.

As Professor Bator said, there has been very little said about the contribution of the legal profession to our problems. I think another thing worth noting is that in the last two decades there has been a tremendous change in the profession itself. The legal profession may not be a profession any longer. It may well be that it is a business, just like any other big business in the United States. In New York City, which is the legal community of which I am a part, we have seen greater specialization by law firms. We have seen a tremendous influx of lawyers into the profession itself in the last thirty years after the Supreme Court's decision in *Brown v. Board of Education*.[8] It seems like the brightest and best of our students went to law school; therefore, we presently have a bumper crop of lawyers.

In addition to the increase in the size of the profession, we

8. 347 U.S. 483 (1954).

have new people in the profession, most notably women. When I first went on the federal bench in 1966, I think there were only five women in the country who were federal judges. I think the number today is at least fifty, a tremendous increase in the last twenty years. Of course, women will tell you it should be much more than that, but still it is a change. Also, in 1966 if I saw a woman appear in court, I would tell everybody at dinner that night, "I saw a woman today." Now, there are sometimes nothing but women in my courtroom. I once had an all-woman jury. Somebody said to me after the jury was selected, "A newspaperman is outside your door. He wants your comment on the fact that you have all women on the jury." Well, I had not even noticed it. In the very same case, a woman was going to represent the Government in this big Mafioso case. When I first came on the court in 1966, they did not even let women in the Criminal Division of the United States Attorney's Office. Now, at least a third, I should think, of the United States Attorneys in the Southern District of New York are women. Women represent a new cadre revitalizing the legal profession and they are, of course, extraordinarily able women. In addition, we have minorities in the legal profession who came into the profession after the Supreme Court's decision in *Brown*. In *Brown* black lawyers were able to demonstrate, for the first time in the history of this country, their ability to take a case from a federal district court or state court to the United States Supreme Court and prevail. This brought young blacks into the profession. I think when I graduated from Columbia Law School forty years ago, there may have been 1100 black laywers in the entire country. I do not know what the figure is today, but I would venture to say it is at least ten times that figure.

So, it is fair to say that this profession has changed, and with it, of course, comes new litigation and new areas to explore. Someone once said, "I do not see any abatement in sight unless there is going to be some new dramatic legislation." Apparently, as more of these cases come into the federal courts, we are going to be inundated with litigation for the foreseeable future. Last year, the Southern District of New York had the highest number of cases filed—11,000—since we were authorized twenty-seven judges. The figures show that every year the caseload just goes up and up and up. In addition, we do not have any more help. We still have only two law clerks. They have four at the Su-

preme Court level; each judge at the court of appeals level has three. We do not have any more help at the district court level. I happen to have three because I am the Chief Judge, but everybody else normally has two, and that is what we had when I started twenty years ago. So, we just work ourselves harder and harder, and our law clerks have to work harder and harder at this caseload. That, however, is the kind of society we are in. We are a new society, and you have to go to Europe to really appreciate how young we really are, and how this society is just developing. The United States is a very affluent society, and I think that accounts for the situation that we are in. The best that we can hope for is that our creativity and our ingenuity will continue to prevail so that we can continue to come up with devices that do help alleviate the situation some. You have heard that historically that has been the case, and I do not see any reason why in the future we would not be able to come up with some remedies for the present caseload.

PROFESSOR BATOR: I find myself very comfortable on Judge Motley's left. I feel honored and pleased to sit next to her. I am willing to sit on her right or her left, anywhere she would like to put me. I say that as a joke, but it is also because I think that what I tried to say about the Supreme Court does not position me on the political spectrum. I do not know why it is thought that it is a symptom of this horrible and fatal disease of conservatism to criticize the Court on the ground of the professional quality of its opinions. I certainly do not want to make too much of it, but I do not think Judge Motley has any right to assume because I criticize the Court on those grounds that I am less committed to *Brown v. Board of Education* or the many great things the Court has done in transforming and bringing justice to society than she is.

I would like to connect that with a more general point. I really am in profound disagreement with what might be called the current scoring system that we have for the Supreme Court and all our courts, but particularly for the Supreme Court. This system simply counts results and assigns Justices, judges, courts, commentators, and critics to the "good guy" camp and "bad guy" camp. If you criticize the "good guys," you are automatically a "bad guy." That is really the name of the game: whether you are sympathetic ideologically with this large movement or that large movement in the progress and march of the law.

A different scoring system, which, by the way, I think is the particular responsibility of professors, used to be very much the style of academic criticism of the courts. It has gone out of fashion, and I regret that. I have in mind a system that scores not in terms of whether the "good guy" or "bad guy" results have been reached, but whether the professional quality of the judgments and of the opinions is excellent. This is not just a technical matter, but a moral matter, too—whether the judge has respected the moralities of the craft that are, in a sense, the judge's dues to society. The pledge the judge gives to society in return for these awesome powers is a sense of intellectual and professional discipline towards the law.

I thought the problem I speak of was depressingly evident in the hearings and the debate on the Rehnquist nomination. All of the discussion was in terms of the "good guy"/"bad guy" camps and in terms of results. There was little discussion about professional qualities and what professional and intellectual moralities he might or might not bring to the Court.

I think that the Supreme Court is a troubled institution, even though it is a great institution. The very fact that it is a great institution, however, seems to evoke the responsibility to give thoughtful criticism to whether it is performing its functions in a way that meets professional and intellectual criteria of excellence. I think it is a very profoundly troubled institution and to acknowledge that is not an attack either on the Court or on the ideals that Judge Motley so eloquently spoke of here.

DEAN EDWARD H. COOPER*: If I am going to get a chance to say anything, I had better try it now. I mean to suggest that the problems are in some ways more difficult than anyone has suggested yet. I also mean to suggest a couple of small, niggling questions about a couple of the proposals that have been made and then to come full circle to a somewhat different way of describing the difficulty of institutional reform in the federal court structure we know today.

First, a broad description of the problem begins with the first step of asking how much we want law to do for us in society. We really have not decided that. A subcategory of that is how much we want federal law to do out of that realm of chores

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that we assign to law to do for us. What we are experiencing for the time being is a very substantial expansion in what sorts of problems we ask the law to solve for us and in our temptation to have federal law do those things for us. The more we do that, the more we are asking of the federal court system. It seems to me almost inevitable that we are not going to be federalizing things, making them into federal law, and then leaving them very much, very often, to state courts. If we go that way, we will have another set of problems and another set of institutional dilemmas.

The starting point, then, will have to be with the district court structure. How many district courts should be set up and in what way, with how much bureaucratization; how many levels and tiers of systems between the judge and the task of decision can be tolerated; and how far we can expand that system, obviously are unclear. The focus of the conversation today has been primarily on the assumption that the district court system is more expandable than the appellate structure. That may be. Nonetheless, that itself may be a point of great initial difficulty.

The next step, if I can use for the moment, I think, an inaccurate label, could be described as the case-specific review function of insuring accurate application of "the law" to each case, of achieving justice between the litigants, and of assuring resolution of the dispute in a proper way. That is the function upon which Dean Carrington is focusing, although my description of it is a bit slippery in worrying whether that function is now being performed as well as it ought to be performed. There is a second function that we keep talking about: the function of developing the law, that is, of judge lawmaking. That is the point at which we are decrying the loss of command by the courts of appeals over the district courts, the absence of any system of achieving dependable national uniformity. Part of the difficulty comes precisely at that point.

The twin functions are really not very separate. The assurance of accurate application of the law requires some sense of what the law is. Indeed, it is only by reviewing the applications of the law that you can often understand the underlying concept of law that led to the decision. I do not think they can be separated. Even if they could, our tradition, and here I go back before Baron Parke, is the tradition that the legitimacy of judicial lawmaking depends upon their deciding cases. If we are go-

ing to ask all of these things of the courts, it is going to be extraordinarily difficult to separate judicial lawmaking from the task of reviewing and deciding individual cases. We are sort of stuck with that. All those images still tend to focus on one sort of judicial function—the function of dispute resolution, of essentially people-to-people kinds of disputes.

We have just been reminded that we also have asked of our courts a quite different kind of function. A function for which under current concepts of justiciability cases are often made. Cases are crafted specifically as test cases for the purpose of performing institutional social reform. This is really an enterprise distinct from the enterprise of resolving ordinary people disputes. That kind of function, I suppose, is and must remain uniquely a function of the Supreme Court. We have to find some way to work that function into the system.

How do we do all that? One possibility, which strikes me as quite plausible in the field of tax law, is the specialized court. In other fields, without saying that specialized courts will not come to be both the accepted and acceptable answer, let me suggest doubts of two different sorts.

One doubt is simply uneasiness about the prospect of expertise. Judge Wilkinson suggests that judges of specialized courts may become captive of the forces that champion their appointment.[9] There is, I suspect, a related danger that they may become captives of the institutions they are specifically charged with reviewing. The antitrust FTC court, for example, could become too much a captive of the Antitrust Division and the Trade Commission. I think there is also a much deeper danger of becoming captive of your own expertise. It is the danger of believing, really fully believing, all the nonsense that gets established in far too many areas of expert understanding. I speak to that with some passion from the antitrust perspective. I have taught antitrust for many years. It has gone through some remarkable changes in that period of time. However, we have not yet reached anything that dispassionate analysis could pass for enduring wisdom, or so I suspect.

The second doubt concerns a different kind of problem, which is the technical lawyer's problem. It is the problem of de-

9. *See* Wilkinson, *supra* p. 442.

fining jurisdiction in ways that do not, of themselves, yield untoward results. One possibility in rather broad terms is to define jurisdiction according to issues—to assign cases between tribunals according to the issue that is to be decided. Obviously, this leads to some difficulty in deciding what issues each case presents, but it also leads to the prospect of bifurcated appeals. The same case might have different issues appealable to two different tribunals. The price that would be paid for that is very dear. The alternative is to have case review. The Federal Circuit, which has been offered as an example several times today, has jurisdiction over, among other things, any case in which the jurisdiction of the district court is founded on the patent or plant protection act jurisdiction conferred by title 28, section 1338 of the United States Code.[10] This means they get the whole case. Difficult problems are encountered in assigning interlocutory review and assigning review in cases in which the patent issues have dropped out in an early stage. It also means that the court must decide all issues. By what law does it decide them? It decides them by the law of the regional circuit. The Federal Circuit has taken clear positions as to matters of both procedural and substantive federal law. It will decide all the issues of the case, other than the issues that support its jurisdiction, according to the law of the regional circuit. That is a very difficult chore for a specialized tribunal to undertake. There are very good reasons for doing it that way, but there is also a steep price to pay for having a specialized tribunal decide these issues. Accordingly, the path of specialization has both institutional dangers and niggling jurisdictional questions that should make it the subject of careful consideration before embracing its promise to achieve nationwide uniformity.

In the category of deeper problems, there are questions that, in a sense, go back to those questions asked initially. What will we ask of the law? Particularly, what will we ask of the federal law? What will we ask of the federal law when Congress itself does not know what it wants and passes the questions over to the courts? The structure of our current body of federal law, both substance and procedure, is a function of the court system we have, or that which we think we have. In deciding how much

10. 28 U.S.C § 1338 (1982).

federal law to make and what kinds of problems to give over to the federal courts, Congress has relied upon the quality and the character of the court system. If we are to undertake serious tinkering with the system, either in the direction that emphasizes case-specific review at the expense of national uniformity or in the direction that emphasizes the opportunity to make the law nationally uniform at the expense of case-specific review, we will be tinkering with a system that has much more hanging in the balance than the simple court structure we now know or the question of what to do with 186 active court of appeals judges if we decide to create an appellate division for the district court and find the courts of appeals no longer necessary.

The problems are profound, and I suspect the current course of wisdom would be to go slowly. The intercircuit tribunal is a very modest proposal, one that carries very little cost. I believe that sort of interim proposal is a much wiser and safer course for the federal courts than some of the bolder and more imaginative ideas that we will be forced to confront in short order.

PROFESSOR WRIGHT: Dean Cooper, I wonder if you are not too quick in writing off the possibility of leaving some cases that arise under federal law to state court decision. It seems to me that that has some promise. Judge Motley, Dean Griswold, and Professor Wechsler all have advocated this as one solution to the problem[11] because reducing the number of cases that come into the district courts automatically affects what gets to the courts of appeals. Since 1875 we seem to have taken it for granted that if a case is based on federal law, a federal court is the proper place to take it. I wonder if we do not need to reexamine that.

Clearly, there are some issues of federal law that are so important that we want to make a federal forum available for them. I doubt if that is true of all issues concerning federal law. For example, I do not see why we need to have a federal court administering the Federal Employers' Liability Act.[12] State courts have great experience in tort litigation; I think they could easily handle all of those cases. There is a rather obscure case that came down on July 7th of this year that suggests at least a

11. *See*, e.g., Motley, *supra* p. 470.
12. 45 U.S.C. §§ 51-60 (1982).

possibility along these lines. It is *Merrell Dow Pharmaceuticals Inc. v. Thompson*,[13] a bitterly divided, five-to-four decision. The premise of Justice Stevens' opinion for the Court is that whether a court should take federal question jurisdiction depends upon the importance of having a federal court determine the particular issues involved. I have to agree that it was not especially important for a federal court to decide a tort case in which three of four claims are wholly state-created, and the fourth possible ground for recovery is a claim based on a federal statute that itself does not provide any private remedy, and everybody agreed you could not imply such a remedy from the statute. If we can sweep a number of cases that have federal elements of law in them to the state court, where the Supreme Court ultimately can review if the state court goes badly awry in its interpretation of the federal statute, more room is left in the federal courts for the issues that clearly are of importance in the special role of the federal government. It seems to me that it is no coincidence that the only two organized groups of which I am aware who are lobbying to have diversity jurisdiction abolished (something that I strongly support) are the NAACP and the American Civil Liberties Union. Why? Because they recognize that if you can take what today amounts to roughly one-fourth of the civil cases out of the calendar of the district courts, the district courts will have that much more capacity to take the kinds of cases involving civil rights that these organizations are interested in.

Also, putting some of these cases primarily into the state courts gives you another automatic advantage. Through the state courts, you get a four-tier court system, with three levels of appeal, since almost all states have an intermediate appellate court. The Supreme Court, therefore, would be a fourth-tier court. If we were to try to do that directly on the federal side, we would get all sorts of objections. This way, we can do it by indirection.

DEAN COOPER: One of my colleagues, who really teaches criminal procedure, which I think is a rather rare sort of event, nevertheless takes note of constitutional criminal procedure from time to time. He has hypothesized to me that the average state trial court judge with criminal jurisdiction decides more

13. 106 S. Ct. 3229 (1986).

federal questions and constitutional questions in a given year than the average federal district judge. I am not sure, however, whether that is an accurate hypothesis. Obviously, there are a great many federal questions that are resolved by state courts today. The limits on section 1331[14] jurisdiction insure that will happen and will continue to happen until there is a drastic revision in the rules, including, for instance, the right of removal of federal question defense cases. The price that is paid is exactly the price that we have been talking about. Instead of eleven regional circuit courts of appeals plus various other courts resolving federal questions, it is fifty states plus the District of Columbia system, in addition to the federal courts. We must resolve questions of how much uniformity we want.

The Supreme Court went through much argument about the proper use of its certiorari jurisdiction in an effort to achieve some uniformity in FELA cases. There was a period of trying to teach lower courts, including lower state courts, that they really must understand, even though the Supreme Court could not say it directly, that the FELA is a workers' compensation system administered by jury trial. The lower courts finally got the message from the Court. The cost of doing this, however, was a very substantial drain on the Court's docket for a number of years, and we all pay that price.

I am not questioning the ability of state courts to do it. They decide federal questions regularly. Professor Meador says twenty-eight percent of the decisions he surveyed had actual holdings that necessarily disposed of a federal question.[15] That is a lot of federal questions. We can do more and more of it if we are willing to give up the image of opportunity for uniformity.

PROFESSOR WRIGHT: Let me just add one more thought on that point. The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act[16] provides that if you want to bring your case in federal court, your claim has to be at least $50,000. This is a much higher jurisdictional amount than in any other kind of litigation. It would seem to me that if Congress felt comfortable with the way state courts administered the statute it passed, as it must have because the great bulk of claims are

14. 28 U.S.C. § 1331 (1982).
15. *See* Meador, *supra* p. 455.
16. 15 U.S.C. §§ 2301-2312 (1982).

less than $50,000, it could have gone all the way and enacted rules about warranties, but have left their resolution wholly to the state courts. Of course, you could get occasional problems, such as the ones I remember very well about the FELA, but I share Judge Wilkinson's perception that the state courts today are not the same state courts that we had in the 1950s,[17] and that Congress might think it perfectly safe to rely on the state courts entirely for the enforcement of some of these statutes in areas where there can be perceived an advantage in having some uniform rule on products liability.

DEAN CARRINGTON: That might be the opening wedge in the process of the federalization of the state judiciary. Well, it is not an opening wedge because it is already in progress, but it is a step in that process. Congress does, from time to time, in the process of the federalization of the state judiciary consider legislation under the rubric of the Federal Courts Improvement Act of 1982,[18] which in a variety of different ways undertakes to help the state courts become better, which means to become more like federal courts. One surmises that if you were to go very far down the trail of sending federal cases into state courts, that Congress and the pressure groups and political organizations that deal with Congress would want to take a greater interest in the quality of the state courts and might use the power of the federal purse to obtain a lot of results. Some of this would be very benign, and we might someday end up with a unified judicial system. That strikes me as not an improbable result. As Judge Motley suggests, we are a young culture. It took the English five hundred years to consolidate the common-law courts. Maybe in five hundred years we can eliminate the federal judiciary altogether.

PROFESSOR MEADOR: I think that is a very plausible prediction. Congress just created the State Justice Institute, which is a federally authorized corporation whose sole mission in life is to spend federal money to help state courts.[19] This is a permanent organization. A lot of state court funding had been

17. *See* Wilkinson, *supra* p. 441.

18. Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered titles of U.S.C.).

19. *See* State Justice Institute Act of 1984, 42 U.S.C. §§ 10,701-10,713 (Supp. II 1984 & Supp. III 1985).

done under LEAA,[20] but that was a rather temporary thing. The Institute is an effort by Congress to channel federal money to state courts.

In addition, I think Professor Wright's idea of channeling federal cases into state courts is a rather promising one. I have been taken with that for sometime myself.

All these things are interrelated; therefore, as Dean Cooper points out, if you channel the federal cases into state courts at the trial level, that pig is going to come out at the other end of the tunnel at the top—the appellate level—as a federal case reviewable by the Supreme Court. This simply exacerbates the existing problem of an overload at the top of the system, which brings us back around to the question of what we are going to do about that. In recent years the idea of creating a federal appellate tribunal whose mission will be to review state court decisions on federal questions has been put forward several times. I believe this may have a good deal of promise. It would just be another variation on the theme of reorganizing the federal appellate structure along subject matter lines. One category that could be created is an appellate tribunal reviewing all state court decisions, and then that one tribunal would be reviewable by the Supreme Court on writ of certiorari. But the appellate tribunal would collect fifty-two jurisdictions into a single forum, resulting in a weeding out or screening process before the fifty-two would hit the Supreme Court directly. I think all of that has some potential and I would anticipate and predict developments in that direction, but slowly and haltingly.

PROFESSOR WRIGHT: Would you be willing, Professor Meador, to do something more limited in the first instance since we know how hard it is to achieve any reform? I, too, am taken with the idea of a federal appellate court reviewing state court decisions, but I think that would be much more salable if the reform were similar to the idea Clement Haynsworth put forward about twelve years ago. He proposed a federal court that

20. Law Enforcement Assistance Act of 1965, Pub. L. No. 89-197, 79 Stat. 828 *amended by* Pub. L. No. 89-798, 80 Stat. 1506 (1966) (authorizing expenditures for four fiscal years for federal programs, administered by various federal agencies, for the purpose of assisting in training state and local law enforcement officers and criminal justice administration officials in the improvement of their capabilities and techniques).

would review state court criminal decisions.[21] I think that would be salable because if you have a federal court at that stage in the appellate process, it makes it a much more powerful tool with which to cut back on the scope of habeas corpus. I believe not only all the federal lower court judges, but virtually all the state judges, would support such a scheme. The state courts might not like being reviewed by a federal court lower than the Supreme Court, but they would welcome any cutback on federal habeas corpus for state prisoners. Therefore, I think it is conceivable that something of this sort might be salable. If it works, it would be a lot easier to broaden the jurisdiction of the court because it is an existing court.

PROFESSOR MEADOR: I certainly agree in essence with that. I remember Judge Haynsworth's article. I thought it was a very good idea at that time. One objection made to it was that an appellate court with exclusively criminal jurisdiction would bring out some of the dark and unseemly political forces to which Judge Wilkinson alluded.[22] It would tend to focus all of the emotion involved with the law and order versus individual rights debates on the selection of judges. That does not bother me greatly, but it is, I think, part of political reality that such opposition may be there. On the other hand, as you say, it may be more politically salable to start with that first step rather than empowering the court with total jurisdiction over all state decisions.

JUDGE WILKINSON: It seems to me, and again this is impressionistic, that the single portion of our docket growing by leaps and bounds is the diversity portion. There are months when as many as ten of the twenty cases on which we hear oral argument are diversity cases. Many should have gone to state court, but many litigants and lawyers are voting with their feet for federal court. The cases often involve very complex commercial litigation to which we must devote our full attention. There have been calls either to abolish diversity jurisdiction or to limit its invocation. Yet, the support in Congress for those steps is about the same as the support for raising the salaries of federal

21. Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A. J. 841 (1973); *see also* Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597 (1973).

22. *See* Wilkinson, *supra* p. 442.

judges; that is, there is not much support at all.

The other question that Professor Meador raises concerns the absence of a constitutency for structural reform of the federal court system. I wonder if there is widespread public dissatisfaction within the bar and among the public-at-large with the job that the federal courts are doing today. As I understand the history that Dean Carrington has detailed, the genesis of the Evarts Act was the widespread perception of the district judge as tyrant.[23] Does anything like that degree of public dissatisfaction with the functioning of the federal court system exist today? Congress wants to keep diversity jurisdiction; litigants opt for federal court on diversity cases; and structural reforms are hard to come by. Is the lesson of all these individual signs that a large number of people are more or less satisfied with the kind of justice that they are getting from the federal courts? It is tough, I think, on those of us who work within the system, and who are familiar with the crunch of work, and who want more time to devote to each case; we have our frustrations. Those who think about the federal court system in the next century and how we are going to cope with all these things also have their misgivings. I wonder, however, if the public as a whole is not relatively well satisfied, and if this satisfaction might be the problem with reforms getting off the ground.

PROFESSOR BATOR: Speaking only to Judge Wilkinson's last point, I am also rather puzzled on whether there is dissatisfaction and what its nature is. If I think only about the point that Dean Carrington emphasized, which is the review process in cases in which the problem is very fact-bound and where there is not significant disagreement or uncertainty about the applicable law,[24] I simply am puzzled whether, although there has been a reduction in the amenities of the process and in many of those cases you get no argument or very short time to argue, there is a serious sense of injustice and short shrift on the parts of litigants and lawyers. Where I think there is great unhappiness and dissatisfaction, though, is on the side of the thing that Dean Griswold emphasized.[25] I think those lawyers and litigants who

23. *See* Carrington, *supra* p. 413-14.

24. *See generally* Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C.L. REV. 411 (1987).

25. *See generally* Griswold, *The Federal Courts Today and Tomorrow: A Summary*

try to operate in an area where the law is uncertain feel very unsatisfied with how difficult and frustrating it is to try to get some kind of sensible and intelligible guidelines on how enterprise ought to operate.

I think that the most serious problem is in the area of business and commercial affairs and the economic life of the country. It is a frustrating sort of dissatisfaction. Lawyers have a bit of a conflict of interest because, on the one hand, it is rather frustrating not to be able to tell the client about the situation, on the other hand, all this litigation and sense of uncertainty generates a huge business for firms and lawyers. I do have a sense that the business community is rather baffled and that it feels that it is captive of the system. I think the business community is just baffled about what we do and what we *can* do, and its dissatisfactions are not easy to register.

JUDGE MOTLEY: If there is not presently public dissatisfaction with the situation, I think it will appear very soon. I think the reason we have so many diversity cases is that lawyers in New York, at least, perceive the federal courts as a place where the judges, rightly or wrongly, are better judges than the state court judges and where the calendars move more rapidly. What they are forgetting is that if they continue to bring these diversity cases into the federal courts, we will soon be like the state courts. I gave you the statistic for our court last year—11,000 civil cases. We presently have twenty-five judges. Our full complement is twenty-seven, but we rarely have our full complement. The state court system must have 30,000 civil cases pending. Therefore, the state court is jammed, and lawyers feel that they cannot get their cases moving. Consequently, they come over to the federal court. Jack Weinstein, the Chief Judge of the Eastern District of New York, told our Judicial Conference a couple of weeks ago that he gives it a year for his court to be just like a state court with respect to the number of cases docketed and the inability to get the cases moving, unless something is done about the situation.

Also, lawyers' perception of the federal judges as being more able than state court judges is probably not altogether correct. Moreover, I would venture to say that unless Congress takes se-

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and Survey, 38 S.C.L. REV. 393 (1987).

riously the matter of judges' salaries, for which we can get no support, there will be a more serious problem with the quality of the federal judiciary. I think the problem is particularly acute right now. We are not going to be able to attract able lawyers to the federal court unless something is done about the salary situation. I have a law clerk who graduated from New York University a year ago. She clerked for me this year. She is leaving to go to a Wall Street firm. She was offered a job at Cravath, Swaine & Moore, one of the largest law firms in New York. She did not take that job, but, if she had accepted that job, her salary one year out of law school would have been $75,000. Federal district judges make $78,700 a year. In other words, a first-year lawyer now makes in New York as much as a federal judge. One does not have to be very bright to know that somebody five years out of law school with the same firm is making three times as much as federal judges are making. That kind of situation will lead to the abler people in the legal profession simply not accepting positions on the federal court. In the past we have had judges leave, particularly after the last salary raise when we had three judges from our court leave, because they just could not live on the salary. Now they are making $300,000 a year. We have to do something about the situation in the federal courts because that problem is real and it is getting worse.

PROFESSOR WECHSLER: I just wanted to add a footnote on the question of lawyer dissatisfaction with arrangements such as oral argument or screening and these other incidents or amenities as the speakers call them. In the work on the Hruska Commission, our staff did quite a good deal of surveying of lawyer sentiment about the current rules on these matters in various circuits. The interesting thing that emerged was that, on the whole, the lawyers seem to be satisfied with these arrangements, which to us on the Commission seemed questionable. Moreover, their responses seemed to be determined primarily by what the existing situation was. The following example will illustrate this point: If you put the question to lawyers in the Fifth Circuit whether the arrangement in the Fourth Circuit would be acceptable, the answer would very likely be no; however, if you put the question to lawyers in the Fourth Circuit whether the arrangement in the Fourth Circuit was acceptable, then the answer was, I think, quite universally yes. No circuit was found in which the lawyers predominantly were dissatisfied with the existing situa-

tion. I think the lesson to be learned is that not much significance can be afforded to the state of satisfaction or dissatisfaction. I think these are issues that call for specialized judgment.

PROFESSOR WRIGHT: I have two footnotes to add. One is directed to what Judge Motley just said. My understanding of the salary structure at Cravath, Skadden Arps, and the other firms that are equivalent to Cravath, is that if the law clerk, instead of going into practice after a year with Judge Motley, had gone on and clerked a second year with the Supreme Court and then had gone to Cravath two years out of law school, her starting salary would be $99,000, more than the Justice of the United States Supreme Court for whom she had clerked. That does seem a little odd.

The other is with regard to what Professor Wechsler just said. He would remember, I know, that when we were bringing the American Law Institute study of jurisdiction (ALI Study)[26] to a close in the late 1960s, a resolution was transmitted to us from the Multnomah County Bar Association in Oregon. I believe that is where Portland, Oregon, is. The resolution said that we favor all proposals in the ALI Study to expand federal jurisdiction, and we are opposed to all of the proposals of the ALI Study to cut back on federal jurisdiction. This would seem to indicate a very high degree of satisfaction by our consumers. Yet, I bet if you would put that to the test by saying, "You love the federal court so much, we will make federal jurisdiction exclusive in every case to which it applies," the Multnomah County Bar Association to a man and woman would have said, "We do not want that at all. What we would like is having a choice so that we can be wonderful tacticians and decide where we are best off in any particular case." In South Carolina, in a personal injury case, the plaintiff's lawyer wants to be in state court, the defendant's lawyer wants desperately to be in federal court, and each resorts to absurd maneuvers to try to create or defeat diversity. In Pennsylvania it is just the opposite. The plaintiff's bar there appoints administrators from across the Del-

26. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969).

aware River because they want to manufacture diversity if they can. So, it has great variations.

END OF PANEL DISCUSSION